IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

CHERITY ANN COX,
Petitioner.

No. 2 CA-CR 2014-0035-PR
Filed September 29, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR047395
The Honorable Jane L. Eikleberry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Jones Law Office, Tucson
By Richard B. Jones
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Cherity Cox seeks review of the trial court's order summarily dismissing her notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which she asserted *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), was a significant change in the law applicable to her case. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Cox was convicted of first-degree murder, drive-by shooting, and four counts of aggravated assault committed in September 1994. She was a juvenile at the time of her offenses. For the murder conviction, Cox was sentenced to life imprisonment without the possibility of release for twenty-five years. We affirmed her convictions and sentences on appeal. *State v. Cox*, No. 2 CA-CR 96-0064 (memorandum decision filed Oct. 1, 1996). Cox also sought post-conviction relief; the trial court denied her petition and we denied relief on review. *State v. Cox*, No. 2 CA-CR 00-0001-PR (memorandum decision filed May 9, 2000).

¶3 In 2013, Cox filed another notice of post-conviction relief citing *Miller* and claiming both that there had been a significant change in the law and that she was actually innocent. *See* Ariz. R. Crim. P. 32.1(e), (g), (h), 32.4(a). In *Miller,* the United States Supreme Court determined that mandatory life sentences for juvenile offenders violated the Eighth Amendment. ___U.S. at ___, 132 S. Ct. at 2469. Instead, the Court concluded, a sentencing court must be able to take into account "an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at ___, 132 S. Ct. at 2467. Based on *Miller*, we recently determined in *State v.*

Vera that, because parole had been eliminated and the only possibility of release would be by pardon or commutation, a sentence of life with the possibility of release "was, in effect," a mandatory life sentence "in violation of the rule announced in *Miller*." No. 2 CA-CR 2014-0154-PR, ¶ 17, 2014 WL 4628502 (Ariz. Ct. App. Sept. 16, 2014).

¶4 The trial court summarily dismissed Cox's notice, concluding *Miller* did not apply to her and that her claim of actual innocence was precluded because she had raised it in a previous petition for post-conviction relief. Cox then filed a motion for rehearing, which the court denied. A few days later, an amicus brief "in support of [Cox]'s motion for reconsideration" was filed by the Arizona Justice Project (AJP). In that brief, the AJP argued that, because parole had been eliminated for offenses committed after January 1, 1994, Cox's sentence was "a *de facto* life-without-parole sentence in facial violation of *Miller*." The court accepted the amicus brief but denied the motion for reconsideration.

¶5 Cox then filed a pro se petition for review arguing that *Miller* was retroactively applicable to her case based on the analysis outlined in *Teague v. Lane*, 489 U.S. 288 (1989),[1] that she is entitled to relief under *Miller* because parole is unavailable, and that life without parole is not a "constitutionally permissible sentence." While the petition was pending, our legislature enacted A.R.S. § 13-716. *See* 2014 Ariz. Sess. Laws, ch. 156, § 2. That statute provides that juvenile offenders like Cox who are "sentenced to life imprisonment with the possibility of release after serving a minimum number of calendar years" are "eligible for parole on completion of service of the minimum sentence." § 13-716. We requested supplemental briefing from the parties addressing the effect of § 13-716 on the issues presented in this case.

[1]Because we determine Cox is not entitled to relief in any event, we need not determine whether *Miller* is retroactively applicable.

¶6 Cox, now represented by counsel, argues in her supplemental memorandum that, although § 13-716 purportedly makes her eligible for parole, her sentence nonetheless violates *Miller* because no sentence with a "parole option" was available when she was sentenced. She further argues the legislature was not permitted to retroactively modify her sentence, and § 13-716 violates the separation of powers established by article III of the Arizona Constitution and was not expressly made retroactive.

¶7 This court recently determined in *Vera* that § 13-716 has provided juvenile offenders sentenced to a life term without the possibility of release for a term of calendar years with "an opportunity for parole" compliant with *Miller* and with *Graham v. Florida*, 560 U.S. 48 (2010), rendering moot claims based on the absence of parole availability. 2014 WL 4628502, ¶ 27. And we rejected the argument that § 13-716 impermissibly modifies a juvenile defendant's sentence because it "affects only the implementation of [the] sentence by establishing . . . eligibility for parole after [the defendant] has served the minimum term," and thus is not a retroactive statute but is instead a "remedial statute that affects future events." *Vera*, 2014 WL 4628502, ¶ 21. We additionally rejected the notion that § 13-716 violates the separation of powers, concluding it instead provided "an additional opportunity for release for juveniles sentenced to life imprisonment, available only after their mandatory minimum terms have been served." *Vera*, 2014 WL 4628502, ¶ 22.

¶8 Cox further claims, however, that § 13-716 does not "actually fix the problem" identified in *Miller* because she did not receive "individualized sentencing" as required by that case. But, in addressing "individualized sentencing," the Court in *Miller* stated only that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." ___ U.S. at ___, 132 S. Ct. at 2475. Cox did not receive the harshest possible penalty. The sentencing court had the discretion to impose a natural life sentence. *See Vera*, 2014 WL 4628502, ¶ 15 & n.3 (explaining first-degree murder sentencing options). It instead imposed the most lenient sentence available—life without the possibility of release for twenty-five years. *See id.*

Thus, even assuming Cox did not receive the sort of "individualized sentencing" contemplated by *Miller*, that fact would not affect the validity of her sentence.

¶9 For the reasons stated, although review is granted, relief is denied.